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Intermediary Liability & Freedom of expression: Recent developments in the EU Notice & Action Initiative

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Contents

Abstract

In the European Union, liability of Internet Intermediaries for third parties' content is regulated by the e-Commerce Directive. This instrument introduced liability exemptions for certain Internet Intermediaries, subject to specific requirements. The providers of so-called 'hosting services', for example, shall only enjoy such immunity provided they act expeditiously to remove illegal online content upon request. This mechanism, however, creates a risk for the fundamental right of freedom of expression. Without the necessary safeguards, this mechanism has the effect of inducing private censorship. Moreover, this mechanism has not been uniformly adopted in the EU countries creating a situation of great legal uncertainty. Cognisant of these problems, the EU has decided to review its rules on the Intermediary liability by commencing a 'Notice and Action' initiative. This paper describes the problem that the current legislation entails with regard to freedom of expression. From this perspective it, further, looks into the actions undertaken to this date by the European Commission on the topic of Notice and Action.

Keywords

e-Commerce Directive, Intermediary Liability, Notice and Action, Notice-and-Take down, Freedom of expression

Introduction

The Internet has revolutionized the way information flows within our society. In this brave new world, a variety of content is readily available to a broad audience. Some of this content, however, is considered undesirable in a public sphere. Internet Intermediaries, who are the actual enablers of Internet communications, are often seen as natural points of control for online content.[1] This is because they are in a position to eliminate access to objectionable material and, quite often, to identify wrongdoers. With such power at their hands, they seem to be natural candidates to help keep the Internet 'clean'.[2] The involvement of intermediaries in curtailing the speech of Internet users, however, leads to concerns about the effective exercise of freedom of expression through this medium. Potential risks include undue restrictions to speech and privatized censorship.

'Notice-and-Action' is an umbrella term for a range of mechanisms designed to eliminate illegal or infringing content from the Internet.[3] It comprises mechanisms such as the 'Notice-and-Take down' (NTD) scheme which currently results from Article 14 of the e-Commerce Directive (ECD).[4] Under this provision, hosting service providers can benefit from a liability exemption provided they 'act

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[1] Zittrain J., A History of Online Gatekeeping, Harvard Journal of Law and Technology, Vol. 19, No. 2, 2006, p.254; C. Wong, J.X. Dempsey, Mapping Digital Media: The Media and Liability for Content on the Internet, Open Society Foundation, Reference Series No.12, 2011, p. 14.

[2] A clean and open Internet: Public consultation on procedures for notifying and acting on illegal content hosted by online intermediaries, http://ec.europa.eu/internal_market/consultations/2012/clean-and-open-internet_en.htm .

[3] '*The notice and action procedures are those followed by the intermediary internet providers for the purpose of combating illegal content upon receipt of notification. The intermediary may, for example, take down illegal content, block it, or request that it be voluntarily taken down by the persons who posted it online*'. Commission Communication to the European Parliament, The Council, The Economic and Social Committee and The Committee of Regions, A coherent framework for building trust in the Digital Single Market for e-commerce and online services {SEC(2011) 1640 final}, p. 13, ft. 49, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0942:FIN:EN:PDF.

[4] The main difference is that in Notice-and-Action a broader range of actions against the content can be taken, providing a possibility for a tailored response (e.g. 'notice-and-notice' or 'notice-and-stay down');
Directive 2000/31 of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ L 178, 17.07.2000.

expeditiously' to remove or disable access to content upon learning of its illegal nature. This provision has been the subject of an increasing amount of criticism.

ROADMAP - The purpose of this paper is to take stock of the initiatives undertaken by the EC on the topic of Notice and Action from the perspective of freedom of expression. Our starting point is the current state of legislation and its flaws. The vivid criticism, which is described next, has led to the public consultation on the e-Commerce Directive held in 2010.[5] Next, we discuss the 2012 Communication on e-Commerce and other online services[6], which formed the basis for the Notice and Action initiative. After that, we briefly summarize the Commission Staff Working Paper on the Online services, including e-Commerce, in the Single Market[7], which accompanied the aforementioned Communication. Then, the most recent consultation on Notice and Action procedures from 2012 is presented.[8] Here, several samples of the stakeholder's responses are included. Finally, the most recent developments on Notice and Action are outlined.

[5] Public consultation on the future of electronic commerce in the internal market and the implementation of the Directive on electronic commerce (2000/31/EC), http://ec.europa.eu/internal_market/consultations/2010/e-commerce_en.htm .

[6] Commission Communication, A coherent framework for building trust in the Digital Single Market for e-commerce and online services, *Op. Cit.3*.

[7] European Commission, Online Services, Including e-commerce in Single Market, Commission Staff Working Paper, 11.1.2012 SEC(2011) 1641 final; Accompanying the document: Communication from the Commission to the European Parliament, the Council The European Economic and Social Committee and the Committee of the Regions, A Coherent framework to boost confidence in the Digital Single Market of e-commerce and other online services, COM(2011) 942, http://ec.europa.eu/internal_market/e-commerce/docs/communication2012/SEC2011_1641_en.pdf.

[8] A clean and open Internet, *Op. Cit.* 2.

1. Current state of affairs

Since the emergence of the Internet industry, liability of Internet intermediaries has been considered a problematic issue. Providers of intermediary services, such as access providers and hosts, became quickly aware of their potentially high risks in content liability cases.[9]

Their main areas of concern included (a) the potential negative consequences of liability on growth and innovation; (b) their lack of effective legal or actual control over the content; as well as c) the inequity of imposing liability upon a mere intermediary.[10] In the light of the emerging case law and a lack of harmonisation, the young Internet industry launched a plea for immunity for third parties content. [11] In response, policy makers around the world developed limited liability regimes. These regimes generally consisted of two basic principles: a) lack of responsibility of intermediaries for third-party content provided they don't modify that content and are not aware of its illegal character; and b) no general obligation to monitor content.[12] Such immunity was meant to stimulate growth and innovation of the newly born technology and provide positive incentives for further development.[13]

This regime could first be spotted in the US Communications Decency Act (CDA) 1996 in its section 230.[14] Intellectual property violations were addressed separately in the Digital Millennium Copyright Act (DMCA) 1998. This instrument introduced an additional immunity condition, which requires intermediaries to act expeditiously to remove illegal content upon notification ('notice-and-take down'). The DMCA created a safe harbour scheme for several groups of Internet intermediaries, namely: mere conduits, hosts and linking tools like search engines and hyper-links.[15]

In the European Union the question of liability for Internet intermediaries was first addressed in the e-commerce Directive 2000/31.[16] The Directive takes a horizontal approach to the liability, which means that it applies to various domains and any kind of illegal content.[17] It provides for liability exemptions for three groups of Internet intermediaries depending on the type of service they provide: mere conduit, caching, or hosting.

Hosting service, which constitutes the main topic of this article, consists of the storage of information provided by a recipient of the service, at his request. Such storage may be provided for a prolonged period of time, and may be either the primary or secondary object of the service.[18]

Under art. 14 of the e-Commerce Directive, hosting service providers are exempted from liability if they have no knowledge of illegal activity or information. However, hosts only remain immune if they act expeditiously to remove or disable access to information upon obtaining knowledge about its illegal

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[9] OECD, Directorate for Science, Technology and Industry, Committee for Information, Computer and Communication Policy, The Role of Internet Intermediaries In Advancing Public Policy Objectives, Forging partnerships for advancing public policy objectives for the Internet economy, Part II, 22.06.2011, p. 11.
[10] *Ibid*., p.6.
[11] *Ibid.*, p.11.
[12] *Ibid.*, p.6.
[13] *Ibid.*, p.11.
[14] According to the Act: 'No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider'. 47 U.S.C. § 230, http://www.law.cornell.edu/uscode/47/230.html.
[15] OECD, The Role of Internet Intermediaries In Advancing Public Policy Objectives, *Op. Cit*. 9, p.14.
[16] Directive 2000/31/EC , *Op. Cit*. 4.
[17] Helberger N., et al., 'Legal Aspects of User Created Content' in IDATE, TNO, IViR, User-Created Content: Supporting a Participative Information Society, Study for the European Commission (DG INFSO), December 2008, p. 220, available at: http://www.ivir.nl/publications/helberger/User_created_content.pdf.
[18] Walden I, Cool Y., Montero E., 'Directive 2000/31/EC –Directive on electronic commerce' in: Bullesbach A., Poullet Y., Prins C. (eds), Concise European IT Law, Kluwer Law International Alphen aan den Rijn, 2005, p. 243, 253.

character. Strictly speaking, the e-Commerce Directive does not actually provide a 'notice-and-take down' mechanism. It merely implies it through its conditions for liability exemption.

Interestingly, the Directive introduces different requirements of knowledge level with regard to criminal and civil liability. In order to rely on the exemption from criminal liability no actual knowledge can be present. As regards claims for damages, hosts shall be immune as long as they are not aware of facts or circumstances from which the activity or information is apparent. The provider of a hosting service can obtain knowledge about the illegal character of hosted content in a number of ways. He could find such content through his own activities or he could be notified about the situation by a third party. The e-commerce Directive foresees two types of third party notifications. Notifications could stem either from public authorities (e.g. courts or administrative bodies), or from private entities. In the latter case, the provider of the hosting service is called upon directly by a private individual to take down the content in question. In this scenario the provider must assess whether such complaint is credible and decide whether or not take an action.

2. Criticism of the current legislation

Burdening intermediaries with a task of assessing the legitimacy of a complaint and the character of the content has been frequently called unfair.[19] There are several reasons for such an opinion. First of all, private companies might not have enough legal knowledge to assess the (il)legality of third party content. This is particularly the case if the content is not manifestly illegal, which may occur where the subjective rights of individuals are at stake.[20] Furthermore, enlisting private companies to decide upon such delicate issues can bring many undesirable effects.[21] An example can be found in recent events during which Google was pressured to remove an offensive anti-Muslim movie from its YouTube platform.[22] Google refused to comply with a request of the US government to remove the video from the Internet, arguing that no policies were violated.[23] At the same time it arbitrarily decided to block access to the video from certain countries. As a result, Google was accused of paternalism and moral policing of free expression.[24]

The specificity of 'notice-and-take down' mechanism implies that intermediaries shall, as a rule, experience a conflict of interests. In essence, they have to decide swiftly about removing or blocking content in order to exonerate themselves from possible liability. This basically makes them a judge in their own cause. In these circumstances, the most cautionary approach is to act upon any indication of

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[19] Lievens E., Protecting Children in the Digital Era – the Use of Alternative Regulatory Instruments. Martinus Nijhoff Publishers, International Studies in Human Rights, Leiden, 2010, p. 360 (with reference Montero E., 'La responsibilite des prestataires intermediaries sur les reseaux', in: Montero E. (ed.), Le commerce electronique europeen sur les rails?, Cahiers du CRID, Brussel, Bruylant, 2001, 289-290).

[20] Barceló R. J. and Koelman, K., 'Intermediary Liability In The E-Commerce Directive: So Far So Good, But It's Not Enough', Computer Law & Security Report 2000, vol. 4, pp. 231-239; Barceló R. J., On-line intermediary liability issues: comparing EU and US legal frameworks, Electronic Commerce Legal Issues Platform, Deliverable 2.1.4bis, 16 December 1999, p. 13 – 17, available at: http://www.qlinks.net/lab991216/liability.doc; The Organization for Security and Co-Operation in Europe and Reporters Sans Frontiers, Joint declaration on guaranteeing media freedom on the Internet, 17-18.06.2005, available at: http://www.osce.org/fom/15657.

[21] Council of Europe (Council of Ministers), Declaration on freedom of communications on the Internet, 28.05.2003, p. 11, available at: http://www.coe.int/t/informationsociety/documents/Freedom%20of%20communication%20on%20the%20Internet_en.pdf

[22] White House asked YouTube to review anti-Muslim film, David Nakamura, The Washington Post, 14.09.2012, at: http://www.washingtonpost.com/blogs/post-politics/wp/2012/09/14/white-house-asked-youtube-to-review-anti-muslim-film

[23] Why Google Shouldn't Have Censored The Anti-Islamic Video, Eva Galperin, Techcrunch, 17.09.2012, at: http://techcrunch.com/2012/09/17/why-google-shouldnt-have-censored-the-anti-islamic-video/

[24] YouTube under new pressure over anti-Muslim film, BBC News, 19.09.2012, at: http://www.bbc.com/news/technology-19648808

illegality, without engaging in any (possibly burdensome and lengthy) balancing of rights that require protection. As a result, any investigation of the illicit character of the content is usually non-existent.[25] This may lead to preventive over-blocking of entirely legitimate content. In fact, the notice-and-take down mechanism creates 'an incentive to systematically take down material, without hearing from the party whose material is removed, thus preventing such a party from its right to evidence its lawful use of the material'.[26] This could easily lead to private censorship.[27] It also opens a way to potential abuse by fictitious victims, for example by business competitors or political adversaries.[28]

A process whereby a private party, and possibly future defendant, decides arbitrarily whether content should be removed or blocked can lead to interference with the right to freedom of expression, as delineated in art. 10 of the European Convention of Human Rights[29] and art. 11 of the Charter of Fundamental Rights of the European Union.[30] Concern about possible 'chilling effect' on freedom of expression was expressed by a number of organizations, for example the Council of Europe.[31] The current mechanism also appears to be at odds with the principles of proportionality and due process.[32]

At the EU level, no guidelines were advanced with regard to the implementation of notice-and-take down. The Directive left the introduction of the actual procedures to the discretion of the Member States. In recital 46, it stipulates that the removal or disabling of access should be undertaken in observance of this right and of procedures established for this purpose at national level. In its art. 16 and recital 40 the Directive encourages self-regulation in this field. Since the majority of the Member States chose for a verbatim transposition of the Directive, the matter was mostly left to self-regulation.[33] This however proved to be inefficient – in most of the countries no measures were ever introduced. The result is a lack of any firm safeguards in many jurisdictions.[34]

The question arose, therefore, whether the existing European legal framework on notice-and-take down procedure should be amended to ensure safeguards for the proper balancing of the fundamental human rights at stake. To address the growing criticism the European Commission initiated the review process of the e-Commerce Directive.

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[25] Discussion in C. Ahlert, C. Marsden and C. Yung, "How Liberty Disappeared from Cyberspace: the Mystery Shopper Tests Internet Content Self-Regulation" ("Mystery Shopper") at http://www.rootsecure.net/content/downloads/pdf/liberty_disappeared_from_cyberspace.pdf.

[26] Barceló R. J. and Koelman, K., *Op. Cit*. 20, p. 231.

[27] Barceló R. J., *Op. Cit*. 20, p. 13 - 17; Lievens E., *Op. Cit*. 19, p. 360.

[28] T. Verbiest et al., Study on the liability of Internet Intermediaries, Markt/2006/09/E, 12.11.2007, p.15, available at: http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/final_report_en.pdf; OECD, The Economic and Social Role of Internet Intermediaries, April 2010, ft. 83, available at: http://www.oecd.org/internet/ieconomy/44949023.pdf; Urban J. and L. Quilter, "Efficient Processes or Chilling Effects? Takedown Notices under Section 512 of the Digital Millennium Copyright Act," 22 Santa Clara Computer & High Tech. L.J., 2006, p. 612.

[29] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No. 005, 04.11.1950, Rome, available at: http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm;

[30] Charter of Fundamental Rights of the European Union, 2000/C 364/1, 18.12.2000, available at: http://www.europarl.europa.eu/charter/pdf/text_en.pdf.

[31] Council of Europe (Council of Ministers), *Op. Cit*. 21, p. 6; Council of Europe, Human rights guidelines for Internet Service Providers – Developed by the Council of Europe in co-operation with the European Internet Service Providers Association (EuroISPA), July 2008, , paras 16, 21 and 24, available at: http://www.coe.int/t/dghl/standardsetting/media/Doc/H-Inf(2008)009_en.pdf; C. Wong, J.X. Dempsey, *Op. Cit*. 1, p.16; See also: Electronic Frontier Foundation, "Takedown Hall of Shame," available at http://www.eff .org/takedowns; and Chilling Effects Clearinghouse, available at http://www.chillingeff ects.org/index.cgi.

[32] Horten M., The Copyright Enforcement Enigma – Internet Politics and the 'Telecoms Package', Palgrave Macmillan, 22 Nov 2011, p. 48-50.

[33] T. Verbiest et al., *Op. Cit*. 28, p. 14-16.

[34] Commission Staff Working Paper, *Op. Cit*. 7, p. 43 - 47.

3. Review of the e-Commerce Directive

In 2010, the European Commission launched a public consultation on the e-Commerce Directive as part of its periodic review process.[35] Stakeholders were generous in their responses, thereby providing considerable insight into the various perspectives. Responses were submitted by businesses and business associations (which included different types of intermediaries, as well as copyright industry); civil society; public authorities, lawyers, and individual citizens.[36] The consultation revealed that the majority of respondents generally did not see a need for a revision of the Directive at that stage. Some of them, however, expressed their concern about the limited protection for freedom of expression offered by the Directive.[37] Many respondents identified the need to clarify certain aspects of the Directive, particularly with regard to intermediaries' liability for third-party content. The most 'thorny' issue was the functioning of the 'notice-and-take down' procedures. The public consultation revealed that a number of problems with regard to such procedures still persisted. Most of the stakeholders mentioned legal uncertainty as an issue, highlighting that several key terms remain subject to divergent interpretations – not only across Europe but also among different stakeholders. Right holders generally complained about the time during which illegal content stays online, while civil society pointed out that often legal content is taken down without good reason. Many stakeholders expressed the opinion that the current legal situation results in an 'inappropriate transfer of juridical authority to the private sector'.[38] Moreover, it was generally felt that the current legal approach incentivises unnecessary and undesirable restrictions on the freedom of expression.[39] The European Commission concluded that procedures aimed at eliminating illegal online content should lead to a quicker takedown, but at the same time should better respect fundamental rights (in particular the freedom of expression) and should increase legal certainty for online intermediaries.[40] Basing on these finding the Commission decided to focus its efforts on developing a new European framework for Notice-and-Action.[41]

3.1. The 'Notice-and-Action' Initiative – EC Communication on e-Commerce and other online services

In January 2012, the European Commission announced a new initiative on 'Notice-and-Action' procedures.[42] The goal of this initiative is to set up a horizontal European framework for notice and action procedures, to combat illegality on the Internet and to ensure the transparency, effectiveness, and proportionality of Notice and Action procedures, as well as compliance with fundamental rights.[43]

The Commission considered such a framework to be necessary for several reasons.[44] First of all, it observed that intermediary service providers continue to struggle with legal uncertainty. Such

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[35] Public consultation, *Op. Cit.* 5.

[36] Summary of the results of the Public Consultation on the future of electronic commerce in the Internal Market and the implementation of the Directive on electronic commerce (2000/31/EC), available at: http://ec.europa.eu/internal_market/consultations/docs/2010/e-commerce/summary_report_en.pdf.

[37] See Art. 19 Response to the Consultation, November 2010, http://www.article19.org/data/files/pdfs/submissions/response-to-eu-consultation.pdf, p. 9: "Any revisions to the Ecommerce Directive need to fully take into account the freedom of expression requirements of the European Convention on Human Rights and other international obligations".

[38] *Ibid*., p.9.

[39] *Ibid*., p. 9.

[40] European Commission on Notice and Action Procedures, http://ec.europa.eu/internal_market/e-commerce/notice-and-action/index_en.htm.

[41] Commission Communication, *Op. Cit.* 6, p. 12 – 15.

[42] *Ibid*., p. 12 – 15.

[43] *Ibid*., p.14.

[44] Roadmap - Initiative on a clean and open Internet: procedures for notifying and acting on illegal content hosted by online intermediaries, http://ec.europa.eu/governance/impact/planned_ia/docs/2012_markt_007_notice_and_takedown_procedures_en.pdf .

uncertainty is attributable, at least in part, to the fragmentation of the rules and practices for eliminating illegal online content which are applicable within the EU.[45] In the EC's opinion, such fragmentation hinders the development of online business.

Secondly, according to the EC, the existing mechanisms for elimination of illegal content from the online environment are often ineffective and inefficient.[46] As expressed in the Communication, the Commission felt that it is still too rare and takes too long to remove even obviously criminal content such as child pornography (much to the frustration of citizens).[47]This was considered detrimental to the confidence of citizens and businesses in the Internet.[48] At the same time, it is not uncommon that legal content is taken down, due to incorrect or disproportionate measures. Such measures, moreover, deny content providers their right to be heard and to defend their rightful publication of content. According to the EC, citizens complain about these aspects, as well as lack of transparency of the employed mechanisms.[49] Therefore, the European Commission expressed its intention to improve the existing mechanisms of elimination illegal online content. The revised framework for these procedures should be more efficient, guarantee legal certainty to all parties involved, as well as proportionality of the rules governing businesses. Moreover, respect for fundamental rights, within these procedures, should be ensured.[50] This last objective is, however, phrased in a rather vague manner, without particular focus given to freedom of expression. Unfortunately, the Communication does not contain any further details on how such effect should be achieved.

3.2. Commission Staff Working Paper on Online Services

A more thorough analysis of the existing problems related to elimination of illegal content was conducted in the Commission Staff Working Document on Online services[51], which accompanied the 2012 Communication. This Working Document discusses a range of issues regarding the regulation of intermediary liability in the ECD. The bulk of the analysis focuses on issues of fragmentation and legal uncertainty. Additionally, it discusses some specific problems of the Notice and Action procedures. All of these factors can have a negative impact on freedom of expression of the content providers, as well as content receivers.

LEGAL UNCERTAINTY – Legal uncertainty is the most common complaint of the stakeholders with regard to the Notice and Action regime. This is problematic because vague rules can push intermediaries to an overly cautious behaviour. When not sure about their legal situation they prefer to err on the side of caution, which means that they eliminate disputed content, even if it is actually legitimate.

The most often criticism voiced by the stakeholders referred to the unclear scope of the definitions of intermediaries. Particularly in the case of 'new' services (e.g. video-sharing sites or social networking sites), it can be difficult to establish whether they can benefit from the safe harbors offered by the ECD. Further, they complained about the unclear conditions for exoneration. The Commission discovered that problems start as early as defining the requirements for notice. On the one hand, the notice should be

[45] Commission Communication, *Op. Cit.* 6, p. 14.
[46] Here, the term 'efficiency' seems to be understood mainly as the speed with which content is taken down. Speed is only one parameter by which one can assess the effectiveness of takedown procedures. From a normative perspective, it is equally important that the takedown process sufficiently balances all the rights at stake. For purposes of conceptual clarity, however, this paper will use the term 'efficiency' to refer to the response time of take down requests.
[47] "In general it is still too rare for illegal activities to be effectively stopped and for illegal content to be removed or removed promptly enough", Commission Communication, *Op. Cit.* 6, p.14.
[48] Commission Communication , *Op. Cit.* 6, p. 14;
[49] *Ibid*., p.14;
[50] *Ibid*. p.14
[51] Commission Staff Working Document, *Op. Cit.* 7.

sufficiently detailed for service providers to locate and assess the illegality of the content, but on the other hand, it cannot place too heavy a burden on notice providers.[52] In any case, it should lead to the 'knowledge' of the service providers – actual for criminal liability and constructive for damages.[53] It is not entirely clear, however, what exactly the term 'actual knowledge' in art. 14 implies and what is the boundary between these types of knowledge. These terms tend to be interpreted differently in various countries, and by different stakeholders. For example, the interpretations of 'actual knowledge' range from knowledge obtained through a court order, to informal notice by a user, which, however, should be sufficiently substantiated.[54] General awareness of the service provider is generally considered as leading to the 'constructive knowledge', which is sufficient to claim damages resulting from civil liability.[55] Divergent case law across the EU shows that there is lack of consistency in interpretation of these terms and the following requirements for liability exemptions.[56] The term 'expeditiously' is likewise understood differently by various stakeholders. There is also a disagreement whether the EU should specify what constitutes an 'expeditious' reaction.[57] The right holders claim that the term should be clearly defined and that the given time period should be short. Intermediaries, on the other hand often argue that leaving the meaning of this term open would provide them with some flexibility in applying it.

The Working Document also contained an extensive analysis of specific problems haunting the existing notice-and-take down procedures.

FRAGMENTATION - The main issue is, of course, a lack of uniform rules for Notice and Action procedures across the EU. This is considered to be one of the major obstacles for intermediary service providers as well as for victims of illegal content to exercise their rights.[58] It could also lead to a race to the bottom, in a way that the intermediaries would adopt the interpretation followed by the countries with the most restrictive rules on content. This would allow them to keep their response consistent across different countries and, at the same time, ensure the highest chance of protection against possible liability. Such approach, however, could be highly detrimental for freedom of expression.

COUNTER-NOTIFICATION – In its Staff Working Document, the European Commission also contemplates the use of 'counter-notices' to help protect freedom of expression.[59] Counter-notices can be found in the U.S. Digital Millennium Copyright Act (DMCA), which contains liability exemptions similar to those of the ECD.[60] Several EU countries have also introduced such a measure in their national NTD procedures, but it has not become a standard part of the procedure across Europe.[61] The objective

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[52] *Ibid*., p. 43.

[53] This distinction, however, has not been transposed into all national legislations. See more in: Van Eecke P., Truyens M., Legal analysis of a Single Market for the Information Society, New rules for a new age? a study commissioned by the European Commission's Information Society and Media Directorate-General, November 2009. Chapter 6: Liability of Online Intermediaries, p.19, footnote 97. Available at: http://ec.europa.eu/information_society/newsroom/cf/document.cfm?doc_id=842.

[54] *L'Oréal SA and others*, European Court of Justice (Grand Chamber), C‑324/09, 12 July 2011.

[55] H. Kaspersen and A. Lodder (eds.), E-directive: guide to European Union law on e-commerce : commentary on the directives on distance selling, electronics signatures, electronic commerce, copyright in the information society, and data protection, Den Haag, Kluwer, 2002, p. 88 -89.

[56] See for example: BGH, 23/09/2003, VI ZR 335/02; Dutch Supreme Court 25 November 2005, LJN Number AU4019, case number C04/234HR; M. Turner(ed.) & J. Llevat, "The Spanish Supreme Court clarifies the concept of actual knowledge in connection with ISP's liability", Comp LSR 2010, volume 26, issue 4, 440-441.

[57] Commission Staff Working Document Online services, *Op. Cit*. 7, p. 37 - 39.

[58] *Ibid*., p. 24 – 26.

[59] *Ibid*., p. 45.

[60] This similarity refers to the main concept of the NTD mechanism. The DMCA version of the mechanism contains a number of safeguards, which are absent in the e-Commerce version of NTD.

[61] In particular Finland, Hungary, Lithuania, Spain and UK. See more in: First Report on the Application of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on the Directive on Electronic Commerce, COM(2003) 702 final, Brussels, 21.11.2003.

of these counter-notice mechanisms is to give the providers of allegedly illegal information an opportunity to answer to the allegations of illegality of their content. Proponents argue that such a right to respond would introduce an important element of the due process. It would secure a right to defence for the content providers and would result in a better assessment of the content.[62] Such mechanism could be one way of preventing excessive take downs.[63] Critics argue, however, that a counter-notice mechanism would make the whole process more burdensome, slow and ineffective, and that it would not be appropriate in case of manifestly illegal content (e.g. child pornography). Most of this criticism comes, unsurprisingly, from the copyright industry. This group of stakeholders systematically emphasized the importance of efficiency of the take down process. From the perspective of the freedom of expression and due process, however, it seems that counter-notice would contribute to the legitimacy of Notice and Action.

RESPONSE TIME - Once a notice has been issued, the hosting provider is expected to react. The timeframe for this action, however, is not specified and opinions differ as to when this timeframe starts running. As already indicated earlier, the term 'expeditiously' is interpreted differently by various stakeholders. It is also very likely to be context dependent. From the perspective of freedom of expression, reaction time matters in a way that it either encourages a swift take down (short response time) or it allows for a more thorough assessment of the content (longer, more flexible period). An almost-immediate response does not leave much room for deliberations. The flexible approach, on the other hand, allows for a more balanced response and could more readily promote due process, for example by providing content providers with a right to defence. It should be clear, however, that in this discussion the nature of the infringement should also be taken into account. The same response time will not work in every context. For example a 12 hours period might seem short in some instances (e.g. defamatory statements) but might be too long in case of live streaming of copyrighted material.

ABUSIVE NOTICE - Wrongful notices perhaps present the greatest risk to freedom of expression in the current legal situation. Wrongful notices might be issued in good or bad faith but in both cases they could lead to removal of legitimate content. Certain stakeholders argue that penalization of such wrongful notices would help decrease their number.[64] In their opinion, the issuers of a take-down notice currently have nothing to lose so they just go ahead and try.[65] This, in combination with the absence of any incentive to conduct a thorough assessment, together with a risk of being held liable, results in a situation where the contested information is often removed or blocked by service providers without giving it a second thought. This leads to situations when legitimate content, for example criticism in academic discussion or research, political speech, parody or tribute suffers from such risk-averse behaviour by intermediaries.[66] A question is also asked of who is to be held liable in such situation (the

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[62] GNI, Comments on the Public Consultation on Procedures for Notifying and Acting on Illegal Content Hosted by Online Intermediaries, 5 September 2012, http://globalnetworkinitiative.org/sites/default/files/GNI%20Comments%20on%20EC%20Notice%20and%20Action%20Consult.pdf.

[63] Some research shows that, at least in the context of the DMCA, such counter-notice is rarely used in practice. This is because such counter-notification is considered an added cost, which individuals are not willing to take when exercising their right to speech. See more in: Seltzer W., The Politics of Internet Control and Delegated Censorship for The American Society of International Law, April 10, 2008; Seltzer W., Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment, Harvard Journal of Law & Technology, Volume 24, Number 1 Fall 2010.

[64] Summary of the results of the Public Consultation, *Op. Cit*. 36, p. 12.

[65] Electronic Frontier Foundation, "Takedown Hall of Shame," http://www.eff.org/takedowns – documenting abuses of US trademark and copyright law to silence critics or political opponents. See also J. M. Urban & L. Quilter, *Op. Cit*. 28 , p. 612. See also http://www.chillingeffects.org.

[66] T. Verbiest et al., *Op. Cit*. 28, p. 15; OECD, *Op. Cit*. 28, ft. 83; Shielding the Messengers: Protecting Platforms for Expression and Innovation, CDT, Version 2, updated December 2012, https://www.cdt.org/files/pdfs/CDT-Intermediary-Liability-2012.pdf.

notice provider or the service provider).[67] Most of the commentators argue that the ISPs should not be blamed in such case, providing that they followed the applicable NTD procedure.[68] Currently, this issue is addressed only by some national legislations while others do not attend to this issue at all.[69]

4. Consultation on Notice and Action

4.1. Main issues

Following the release of Notice and Action Staff Working Document, the EC decided to launch a new public consultation. This time the consultation was dedicated entirely to Notice and Action procedures for notifying and acting on illegal content hosted by online intermediaries. The European Commission launched this consultation in June 2012. It consisted of a number of questions to stakeholders with regard to the most pressing issues discussed above. In the following section we will focus only on aspects concerning freedom of expression and due process. Specifically, the following questions shall be considered:

- What is the scope of the term 'hosting' and which types of new services should it cover?
- Should there be rules to avoid abusive notices and what should they entail?
- Should hosting service providers consult the providers of alleged illegal content before taking action?
- How should the hosting service provider act with regard to illegal content and whether there should be an established sequence of actions?
- How can unjustified action against legal content be best prevented?
- Should hosting service providers be protected against liability that could result from taking pro-active measures?

4.2. Response of the stakeholders

Similar to the previous consultation, the EC received a large number of responses from a wide range of stakeholders. The purpose of this section is to provide a snapshot of the nature of the contributions received. Unfortunately, until now the Commission has not published all responses. Only the contributions that were made publically available by their authors shall be discussed over the following paragraphs. This selection consists of 13 responses and is no way representative for all stakeholders.[70] When reviewing these contributions we should also be mindful that different interests are represented not only by different groups, but also within certain groups. The parallels, as well as the contradictions, that can be identified among the contributions are useful for further discussion on the matter.

GENERAL OBSERVATIONS - It is significant that several civil society organizations, private companies and business federations agree that different categories of illegal content require different approaches. Most agree that, given the variety of illegal or infringing content circulating online, a homogenous response system will not guarantee a proportionate remedy. First of all, as stated by EDRI, '*a clear distinction must be made between apparent breaches of criminal law and civil law*'.[71] For

[67] Commission Staff Working Document, *Op. Cit*. 7, p. 46.
[68] *Ibid*., p. 46.
[69] See more in: First Report on the Application of Directive 2000/31/EC, *Op. Cit*. 61.
[70] European Digital Rights (EDRI), Bits of Freedom (BoF), La Quadrature du Net (LQDN), Netzpolitik, Global Network Initiative (GNI), Center for Democracy & Technology (CDT), Art. 19: Global Campaign For Free Expression, Consumer Focus, Google, The European Telecommunications Network Operators' Association (ETNO), European Communities Trademark Association (ECTA), Publishers' Association (PA), Trans Europe Experts (TEE).
[71] EDRI response to the Consultation on Clean and Open Internet, http://edri.org/files/05786204828112491 2Submission_EDRi_NoticeAction.pdf;

example, criminal content such as child abuse should not be treated the same way as infringement of copyrights. According to Netzpolitik '*different policy approaches are essential since the nature of illegal content varies enormously and a one-size fits all approach will inevitably lead one being handled in a disproportionate manner. Providers cannot be expected to judge if material is potentially in breach of civil law or criminal law, and differentiate between criminal law systems of all Member States*'.[72]

It is interesting to note that several civil society representatives expressed no opinion with regard to statements that actions against illegal content are either slow or ineffective.[73] On the contrary, many of the civil society respondents agreed that hosting service providers often take action against legitimate content.[74] They did, however, agree that in the process of eliminating of infringing content there is too much legal fragmentation and uncertainty.[75] This opinion was shared by Google.[76] As pointed out in their response '*the greater the burden that is put upon intermediaries, in terms of liability and the requirement to use resources to mediate or judge third party disputes, the greater will be the incentive to remove content without carefully reviewing, or otherwise evaluating the veracity of the notices received*'. [77] Copyright holders, on the other hand, and business federations representing telecommunications network operators generally disagreed that actions against illegal content are either slow or ineffective or that hosting service providers often take action against legal content.[78]

TERMINOLOGY - Representatives of civil society organizations and hosting service providers agreed that some terms used in the ECD, for instance actual knowledge', 'awareness, and expeditiously', are ambiguous and allow for divergent interpretations.[79] As for the scope of the term hosting', they mostly agreed that the term is not sufficiently clear. Most of them also agreed that the term should include social networks, blogs and interactive dictionaries, video-sharing sites, cloud based services, e-commerce platforms, and cyberlockers. According to Bits of Freedom, '*the 'hosting' criterium must […] encompass a wide range of services and not be technology-specific. This will keep the 'safe harbor' framework relatively easy to understand and to apply*'.[80] La Quadrature du Net proposed a criterion stating that '*the directive could make explicit that the liability exemptions for hosting services apply to all situations when there is no editorial control over the content published, so as to create a framework that can accommodate new and still unknown services*'.[81] These opinions stand in opposition to the view of the copyright holders, which already in 2010 expressed their view that '*providers of new services not foreseen by the legislators of the ECD 'hide' behind its liability exemption although it should not apply to them*'.[82]

Opinions differed with regard to the qualification of search engines. Some of the civil society associations place them within the category of hosting services.[83] Google, however, presented an

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[72] Netzpolitik response to the Consultation on Clean and Open Internet, https://netzpolitik.org/wp-upload/N_a_T_answers_digiges.pdf;

[73] LQDN response to the Consultation on Clean and Open Internet, http://www.laquadrature.net/files/LQDN_Response_Notice_&_Action.pdf; BoF response to the Consultation on Clean and Open Internet, https://www.bof.nl/live/wp-content/uploads/040912-submissiontoformofconsultationeuropeancommission.pdf; EDRI response, *Op. Cit*. 71;

[74] LQDN response, *Op. Cit*. 73, Netzpolitik response *Op. Cit*. 72; EDRI response, *Op. Cit*. 71, BoF response, *Op. Cit*. 73; Art. 19 response, *Op. Cit*. 39.

[75] LQDN response, Op. Cit. 73, Netzpolitik response, *Op. Cit.* 72 , EDRI response, *Op. Cit*. 71, BoF response, *Op. Cit*. 73.

[76] Google response, on file with the Author.

[77] Google response, *Op. Cit*. 76.

[78] ETNO response, http://www.etno.be/datas/positions-papers/2012/etnoc01-dsm-notice-and-action-consultation-sep-2012.pdf, ECTA response, http://www.ecta.org/IMG/pdf/__ec.europa.eu_yourvoice_ipm_forms_dispatch.pdf.

[79] LQDN response, *Op. Cit*. 73, Netzpolitik response, *Op. Cit.* 72, EDRI response, *Op. Cit*. 71, BoF response, *Op. Cit*. 73.

[80] BoF response, *Op. Cit*. 73.

[81] LQDN response, *Op. Cit*. 73.

[82] Summary of the results of the Public Consultation, *Op. Cit*. 36.

[83] LQDN response, *Op. Cit*. 73, EDRI response, *Op. Cit*. 71.

opinion that this type of service should be qualified rather as 'mere-conduit' or alternatively as 'caching'.[84] Due to the technical differences between provided services, they argued, search engines should not be treated equally as, for example, providers of blogging services.

ABUSIVE NOTIFICATIONS – The majority of respondents agreed that there should be rules in place to avoid unjustified notifications. According to Bits of Freedom '*unjustified notices must be avoided in order to keep lawful information accessible and to prevent 'intimidating' notices, claiming high damages or threatening with other legal sanctions*'.[85] According to La Quadrature du Net '*it is the only way to avoid that these procedures be used on a cost-effective logic as a deterrent to competition, or as an illegitimate means to restrict freedom of expression*'.[86] Civil society organizations and several intermediaries agreed that this could be achieved by requiring notice providers to give their contact details; by publishing (statistics on) notices; and by providing for sanctions against abusive notices.[87] This opinion was shared by right holders and business federations. However, copyright holders seem to be less keen on publishing statistics on notices.[88] Civil society organizations also mention other methods, such as: requiring the opportunity to issue a counter-notice; prohibiting automatic notice generation; providing for damages in case of wrongful takedowns; and publishing of transparency reports.[89] Some of them specifically mentioned a need to ensure that the principle of due process is respected.[90]

UNJUSTIFIED ACTIONS – Most correspondents felt that unjustified actions against legal content should be prevented. This could be achieved, many respondents believed, by reducing the amount of abusive notices. The types of measures proposed to address these two issues are largely similar. Such measures would include, for instance: requiring detailed notices; consulting the content provider before any action is taken; providing easy and accessible appeal procedures; publishing (statistics on) notices; and providing for sanctions against abusive notices. Some civil society organizations demanded also that content should only be acted against if a court (or other legally competent authority) order is issued.[91] As put strongly by Netzpolitik, 'Content should never be disabled without a court order since private intermediaries cannot be expected to make judgements about whether content is in breach of criminal or civil law'.[92]

NOTIFICATION TO CONTENT PROVIDERS - One of the most heavily supported measures to prevent the take-down of legitimate content is a requirement that hosting service providers should consult the providers of alleged illegal content before taking action against it. Such solution was advocated by most civil society associations.[93] As clarified by EDRI '*where possible, the owner of the content should be consulted and the ISP should have a system in place that allows for a counter-notice. (…) The US approach 'delete first, ask questions later', is contrary to the ECHR and Charter and therefore must be avoided*'.[94] At the same time, many respondents clarified that this should be the case

[84] Google response, *Op. Cit*. 76.
[85] BoF response, *Op. Cit*. 73.
[86] LQDN response, *Op. Cit*. 73.
[87] LQDN response, *Op. Cit*. 73, Netzpolitik response, *Op. Cit*. 72, Google response, *Op. Cit*. 76, CDT response https://www.cdt.org/files/pdfs/CDT-Comments-Notice-and-Action.pdf (last visited on 7.3.2014);
[88] ETNO response, *Op. Cit*. 78.
[89] BoF response, *Op. Cit*. 73, EDRI response, *Op. Cit*. 71, LQDN response, *Op. Cit*. 73, Netzpolitik response, *Op. Cit*. 72, Consumer Focus response http://www.consumerfocus.org.uk/files/2010/10/Consumer-Focus-response-to-EC-notice-and-action-consultation-on-copyright-infringement.pdf.
[90] Netzpolitik response, *Op. Cit*. 72, Consumer Focus response, *Op. Cit*. 89.
[91] LQDN response, *Op. Cit.* 73, Netzpolitik response, *Op. Cit.* 72, EDRI response, *Op. Cit*. 71, BoF response, *Op. Cit*. 73.
[92] Netzpolitik response, *Op. Cit*. 72.
[93] LQDN response, *Op. Cit.* 73, Netzpolitik response, *Op. Cit.* 72, EDRI response, *Op. Cit.* 71, BoF response, *Op. Cit.* 73, CDT response, *Op. Cit.* 87.
[94] EDRI response, *Op. Cit*. 70.

only if content is not manifestly illegal.[95] For example, Bits of Freedom argued that '*if information is unmistakably unlawful and there is a need to immediately disable access, the hosting provider can disable access right away*'.[96] In such circumstances hosting providers should inform the content provider post-factum, and provide him with information regarding his rights of redress (in court). Business federations, on the other hand, did not always agree that hosting service providers should consult the providers of alleged illegal content.[97] Alternatively, they felt that consultation with the providers of the content should take place after an action against the content has been taken. If it appears that the content was actually legal, it should be re-uploaded.[98]

PROPORTIONATE ACTION – The consultation also addressed the nature of actions to be taken by the hosting service providers. Civil society organizations shared the opinion that any action without a court order can often be premature. Deletion in particular, should only be taken after a court of law has identified an infringement in proceedings respecting due process.[99] They also seemed to agree that immediate take down could very often be seen as a disproportionate action. '*Except for when there is a court order explicitly requiring deletion, disabling access should, in most cases, suffice for the hosting provider to fulfill its obligations under the eCommerce directive*'.[100] The reason for this is that all stakeholders can have a legitimate interest in the content not being deleted.[101] Furthermore, it would also allow for faster re-uploading of content if it is decided to be legitimate after a proper assessment. Business federations often refrain from expressing their preference in this aspect but they seem to share an opinion that hosting service providers '*should in no case replace the role of the judicial authority in the assessment of the legality or illegality of the content or conduct*'.[102] Google presented the view that they should first disable access to the illegal content, for the relevant jurisdiction and to the extent practicable.[103]

PRO-ACTIVE MEASURES - Many civil society organizations expressed the opinion that hosting service providers should not be protected against liability resulting from pro-active measures.[104] Otherwise this could increase general monitoring and result in private censorship, to the detriment of users' fundamental rights. As explained by La Quadrature du Net, '*Pro-active measures by ISP's to detect contentious content are likely to rely on surveillance and censorship tools that violate the right to privacy and freedom of expression. Policy-makers must not only ensure that self-imposed 'general monitoring' is not encouraged by 'liability protections', they must also establish appropriate safeguards to protect users against such privatised censorship adopted under the guise of 'self-regulation*''.[105] According to Google, protection should apply in such situations as well. As stated in their response '*there should be no liability on the intermediary where it acts in good faith to restrict allegedly illegal or otherwise objectionable content.(…) Otherwise, the intermediary is obviously incentivised to take a*

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[95] CDT response, *Op. Cit*. 93.
[96] BoF response, *Op. Cit*. 73.
[97] ETNO response, *Op. Cit*. 78.
[98] ECTA response, *Op. Cit*. 78.
[99] EDRI response, *Op. Cit*. 71, Art. 19 response, *Op. Cit*. 39.
[100] LQDN response, *Op. Cit*. 73.
[101] LQDN response, *Op. Cit*. 73, EDRI response, *Op. Cit*. 71.
[102] ETNO response, *Op. Cit*. 78.
[103] Google response, *Op. Cit*. 76.
[104] LQDN response, *Op. Cit*. 73, Netzpolitik response, *Op. Cit.* 72, EDRI response, *Op. Cit*. 71.
[105] LQDN response, *Op. Cit*. 73. Netzpolitik reminds that general monitoring obligation has been addressed by the CJEU in two cases: SABAM v. Scarlet, C-70/10, http://curia.europa.eu/juris/document/document.jsf?text=&docid=115202&pageIndex=0&doclang=EN&mode=doc&dir=&occ=first&part=1&cid=996022 and SABAM v. Netlog, C-360/10 (European Court of Justice), http://curia.europa.eu/juris/document/document.jsf?text=&docid=119512&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=161927.

hands-off approach and do nothing'.[106] Bits of Freedom also seemed to favour this approach, supporting a 'Good Samaritan'-like solution.[107]

THE ROLE OF THE EU – The majority of respondents agreed that the EU should actively contribute to the proper functioning of Notice and Action procedures. This should be achieved by providing non-binding guidelines, or binding minimum rules. The former solution was preferred by intermediaries such as Google, who advocated for more clarification and legal certainty through a 'communication' or a 'recommendation'. '*These legal instruments are non-binding and therefore flexible enough to reflect the changing online world*'.[108] According to EDRI, if self-regulation was opted for, the Commission should make it clear that it constitutes '*regulation of ISPs' own internal processes (information to notice providers, information to content providers, etc.) and not regulation of third parties, such as content providers*'.[109] Alternatively, according to TEE, self-regulation should be based on binding minimum rules, to prevent the fragmentation we are facing currently.[110] The EC should ensure that 'self-regulation' is not used to bypass the legal provisions protecting fundamental rights. To that effect and to establish legal certainty for ISPs and users, 'clear minimum rules protecting users against abusive restrictions are necessary'.[111]

5. The road ahead

The European Commission was expected to provide a response to the consultation and its results in the course of 2013. In April 2013, the Commission issued a Staff Working Document 'e-commerce Action plan 2012-2015 - State of play 2013'.[112] In this document the EC presented a general summary of the actions taken so far with regard to all the priorities defined in the e-Commerce Communication of 2011. In relation to the Notice and Action initiative, the document briefly summarized the steps taken so far. Unfortunately, there is no mention of any specific measures taken other than the consultation and several workshops. Any future steps are described by a vague statement that 'the Commission services are working on an impact assessment of the notice-and-action procedures'.[113]

Nevertheless, Brussels insiders have indicated that we could expect not only feedback, but that the EC was actually preparing a proposal for a new Notice-and-Action Directive. Such Directive would address the problem of Internet intermediaries uncertainty without the need of amending the whole e-Commerce Directive. The proposal, however, has not yet officially surfaced. Several commentators suggested that the proposal was withdrawn due to heavy industry lobbying and a general sensitivity of the issue, especially in the light of the 2014 European elections.[114] Some feared that the planned initiative might be degraded to a mere recommendation. This brought about disappointment from some Members of the European Parliament. In an open letter to the Internal Market and Services Commissioner Michael Barnier,[115] they expressed their concerns that 'the political process will not gain legitimacy if publically

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[106] Google response, *Op. Cit.* 76.
[107] BoF response, *Op. Cit.* 73.
[108] Google response, *Op. Cit.* 76.
[109] EDRI response, *Op. Cit.* 71.
[110] TEE response http://www.transeuropexperts.eu/documents/TEE%20-%20A%20CLEAN%20AND%20OPEN%20INTERNET.pdf?PHPSESSID=b8ccaeeb109b02b448af5c5c622a2bcd .
[111] LQDN response, *Op. Cit.* 73.
[112] Commission Staff Working Document E-commerce Action plan 2012-2015 - State of play 2013, Brussels, 23.4.2013 SWD(2013) 153 final, available at: http://ec.europa.eu/internal_market/e-commerce/docs/communications/130423_report-ecommerce-action-plan_en.pdf .
[113] *Ibid*., p. 19.
[114] Monica Horten, 2013, Notice and action directive to be blocked as EU backs down, 28 July 2013. Available at: http://www.iptegrity.com/index.php/ipred/893-notice-and-action-directive-to-be-blocked-as-eu-backs-down.
[115] Open Letter to Commissioner Barnier, https://ameliaandersdotter.eu/sites/default/files/letter_commissioner_barnier_notice_and_takedown.pdf .

elected representatives are not allowed to scrutinize and debate proposals of concern in a transparent and democratic manner'.[116] This would be a risk if the draft directive did not reach the Parliament as a result of being converted into a recommendation. Recently, when speaking to the European Parliament, Commissioner Barnier indicated that the works on the Notice and Action initiative shall continue.[117] He admitted, moreover, that while opinions of the MEP's differ with regard to this topic, he believes that that the Parliament should be completely engaged.[118] This statement fuels the hope that the Notice and Action Directive is not entirely off the table.

6. Conclusion

The existing EU legal regime for notice-and-take down procedure incentivises over-compliance and interference with fundamental human rights, specifically freedom of expression. Actions that have the potential to limit online expression or access to information must be prescribed by law and necessary in a democratic society. They should also be proportionate to the aim, i.e. no more restrictive than is required for achievement of the aim. These points should be taken into account when the new legal framework for Notice and Action is developed. To do so would require embedding the principles of transparency, proportionality and due process in the new procedure. Such approach, along with clarification of the most relevant terms, would greatly contribute to legal certainty. For example, establishing formal requirements for notice and its effects is crucial. Intermediaries must first of all be in a position to know which notices they should accept and which can be disregarded. It could also prevent them from taking premature or disproportionate actions. Introduction of a counter-notice should be seriously considered as a way to bring in elements of due process. Such counter-notice, should not, however, constitute an added cost for those who might need to use it. Otherwise, it could discourage individuals from exercising this option and in consequence, make the introduction of such a measure futile.

The struggle to develop a new legal framework for Notice and Action procedures in the European Union will continue, despite facing some obstacles. When analysing the findings of the EC to date, one can clearly observe a push for efficiency, understood as a speedy procedure leading to a permanent removal of illicit content. This push is somewhat troubling. After all, promoting efficiency is only one of the objectives of the revision of the existing regulation. Others, equally relevant, are effectiveness, legal certainty, proportionality and respect for fundamental human rights. Efficiency, therefore, should not take precedence over these other goals. This is particularly relevant for the freedom of expression, which until recently seemed to be rather 'lost in the sauce'.

The sample of responses presented in this paper clearly show that there is quite some common ground among stakeholders. For example, consumer and citizen organisations generally agreed with Internet intermediaries on many points.[119] This common ground could serve as a basis for the development of a new framework on notice-and-action within the EU. At the same time, the consultation exposed several differences that seem impossible to reconcile. In those instances, a clear stand is expected from the EC, who will have to decide which path to take (and in which regulatory form to express it). Chances are that the topic has not been abandoned completely and it will return onto the EU policy agenda after the 2014 European elections. Hopefully, with a new speed and determination.

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[116] *Ibid*.
[117] Monica Horten, 2014, Notice of Action! Barnier to resurrect take-down directive, in Iptegrity.com 6 February 2014. Available at: http://www.iptegrity.com/index.php/ipred/945-notice-of-action-eu-commission-to-revive-take-down-directive .
[118] *Ibid*.
[119] Summary of the results of the Public Consultation, *Op. Cit.* 36, p. 10.

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